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PETITION FOR WRIT

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MOUNTAIN STATES FEDERATION OF TELEPHONE WORKERS, et al, PETITIONERS,

vs.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a corp., RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH COURT OF CIVIL APPEALS OF THE STATE OF TEXAS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

A. SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This case originated in the Thirty-fourth District Court of El Paso County, Texas in which Court Respondent had filed petition for injunction and obtained temporary restraining order from the presiding judge of said Court (R. 1-19).

Petitioners duly and properly filed petition and bond for removal of the cause to the United States District Court for the Western District of Texas, El Paso Division. (R. 20-22).

The presiding judge of the Thirty-fourth District Court refused the petition and bond on the sole ground that the petition did not state a removable cause. (R. 25-29, at 26).

The petition for injunction alleged interference with and a conspiracy to interfere with interstate commerce and a controversy between an employer engaged in interstate commerce and his employees, and unions representing those employees (R. 2-7).

The restraining order was granted without a hearing on the filing of the petition on April 30, 1947 and hearing was

set for May 6th on the question of temporary injunction. (R. 13-14).

The petition and bond for removal were filed by Petiprior to the time set for the hearing on the temporary injunction (R. 20-22). and on motion of Respondent the hearing was postponed on the petition and bond for removal until May 9th and the temporary restraining order continued in force. (R. 25-26).

Petitioners excepted to this action on the ground that the Court was without juridiction to proceed after proper petition and bond for removal had been filed. (R. 26).

On May 9th the Court entered its order denying the petition and bond for removal for the reason that, "this is not a removable cause." (R. 26). Petitioner excepted to this action of the Court. (R. 26).

Petitioners appeal to the Court of Civil Appeals of the Eighth Supreme Judicial District sitting at El Paso, Texas was perfected on May 14, 1947 by filing and having approved the appeal bond. (R. 31).

Thereafter, on the 20th day of May, 1947, Respondent moved to dismiss its petition for injunction (R. 31) which motion was granted by the judge of the Thirty-fourth District Court on the same day. (R. 32).

The Respondent filed a motion with the Court of Civil Appeals to dismiss the appeal on the ground that the petition for injunction had been dismissed and the question was moot.

The Court of Civil Appeals, without an opinion, entered its order granting the motion of Respondent to dismiss. (R. 33).

Proper motion for rehearing was filed by Petitioners and overruled by the Court of Civil Appeals (R.33) and within due time application for writ of error was filed with the Supreme Court of the State of Texas. (R. 34). The Supreme

Court of the State of Texas entered its order without an opinion overruling the application of Petitioners (R. 34) and proper motion for rehearing was filed which motion for rehearing was overruled (R.35).

The motion fo rehearing on the application for Writ of Error before the Supreme Court of Texas was overruled November 12, 1947. (R. 35).

B. STATEMENT PARTICULARY DISCLOSING BASIS OF THIS COURT'S JURISDICTION.

This Court's jurisdiction rests solely on whether the Telephone Company's petition for injunction stated a cause of action over which Federal District Court has jurisdiction and which was therefore removable to the Federal District Court from the State District Court in which it was filed by the Telephone Company. The State Courts refused to permit removal of this suit to the Federal District Court although proper petition and bond were seasonably filed, their refusal being based solely on the ground that the cause was not a removable one. The petition for injunction contained the following allegations pertinent to Federal Courts Jurisdiction:

> "Plaintiff is a corporation duly organized and existing under the laws of the State of Colorado, is transacting business in El Paso County, Texas, and its principal office is located in the City of El Paso in said County. Plaintiff is engaged in furnishing local, intrastate, inter-state and foreign long distance telephone service in what is known as the Mountain States Territor, including El Paso County, Texas, and the States of Arizona, Colorado, Idaho, New Mexico, Utah and Wyoming. It is a public utility and under the Federal and State Laws of Texas and the other States in which it operates, as well as at common law, it is obligated to furnish such service to the public and it is subject to

regulation by the Federal Communications Commission with respect to the inter-state and foreign service rendered by it, and by various regulatory bodies in the several states in which it operates. (R. 2).

"Locals 402 P and 402 T of the Mountain States Federation of Telephone Workers, and certain members thereof, have labor disputes with Plaintiff.

"Local No. 30 and certain members thereof of American Union of Telephone Workers have labor disputes with the American Telephone and Telegraph Company, but there is no labor dispute between said Local and its members and Plaintiff, but the officers and members of said Local have engaged in and are engaging in the unlawful picketing of plaintiff's properties as hereinafter alleged.

"Local No. 37 of the Association of Communication Equipment Workers and certain of its members have labor disputes with Western Electric Company, but there is no labor dispute between said Local and its members, and Plaintiff, but the officers and certain members of said Local have engaged and are engaged in the unlawful picketing of Plaintiff's properties as hereinafter alleged. (R. 4, Par. IV).

"Numerous members of all the organizations and associations herein mentioned, and particularly the Defendants, have been picketing the plaintiff's principal places of business in the City of El Paso, Texas, since April 7, 1947. Prior to April 29, 1947 said picketing as conducted by the defendants and the members of the various organizations, subdivisions and affiliates named as defendants herein, was fairly orderly and peaceful. Plaintiff admits that the defendant Union, Mountain States Federation of Telephone Workers, and the em-

ployees of plaintiff who elect to follow its instructions have a lawful right to refrain from working for plaintiff and have the right to peacefully picket the property of plaintiff and plaintiff does not assert any legal wrong to it or resulting from the exercise of the lawful right to strike and peacefully picket the properties of plaintiff and does not seek in this action in any way to interfere with, prohibit or restrain the defendants in the exercise of such lawful right to strike and to peacefully picket. However, beginning at about 7:30 o'clock a. m. on April 29, 1947, defendants have been engaged in unlawful picketing of plaintiff's properties and particularly the Main Exchange Building located at the intersection of Texas and South Florence Streets in the City of El Paso, Texas, said unlawful picketing consists of the following acts and particulars. (R. 4, Par. V).

"Plaintiff alleges that the defendants and each of them have entered into a conspiracy to bring about the acts herein complained of and the defendants and members of said organizations, subdivisions and affiliates threaten to continue their unlawful acts, intimidation and coercion, and unless enjoined by this Court such unlawful acts, intimidations and coercion will continue to the immediate, irreparable damage of the plaintiff and will cause serious interference with, if not cessation of, vital telephone services with unpredictable damage to and loss of lives and property in El Paso County. (R. 6, Par. VIII).

"Plaintiff further alleges that all acts herein complained of constitute a conspiracy against trade. (R. 6, Par. IX).

"Such acts and threatened acts on the part of the

defendants will result in immediate, irreparable damage and injury to the plaintiff's business, as well as serious injury to the plaintiff and to the peace, safety, health and welfare of the public. (R. 7, Par. X).

"Such action and continued threatened action on the part of the defendants and the defendant organizations, their officers, agents and members, will, as hereinabove alleged, necessarily affect the service which plaintiff is rendering to the public and will result in delay, serious interference or failure of service, involving urgent telephone calls, including calls necessary for the preservation of the public health and safety, police and fire protection, and other emergencies. Such results affect not only the local telephone service, but long distance service throughout the United States and foreign countries. (R. 7, Par. XI).

"Plaintiff says it has no adequate remedy at law and that the conspiracy and unlawful acts and conduct herein alleged will continue to be participated in by the individually named defendants and will continue to be carried on by persons in concert with them, but whose identity is unknown to the plaintiff, and said threatened unlawful conduct and damage, threatens immediate and irreparable harm and loss for which plaintiff has no adequate remedy at law."
(R. 7, Par. XII).

The Federal Statutes involved are:

(a) The Sherman Anti-trust Act, 15 USCA 1, 15, and Clayton Act, 15 USCA, 26.

(b) Federal Court Jurisdiction, 28 USCA Sec. 41 (1), (2), (8), (9) and (23).

(c) Norris-La Guardia Act 29 USCA 101-115.

(d) Wagner-Connery Labor Relations Act 29 USCA 151-162.

(e) Federal Communications Act 47 USCA 151.

(f) Removal of Causes from State Courts to Federal District Courts 28 USCA 71.

C. QUESTIONS PRESENTED.

Does Respondent's petition for injunction alleging interference with and conspiracy to interfere with interstate commerce state a cause of action over which Federal District Courts have jurisdiction and which is removable to the Federal District Court?

If the cause was removable, did the State Court prevent its removal by dismissing the cause after Petitioners properly and seasonably filed petition and bond for removal with the State Court?

D. REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Petitioners are labor unions and members of labor unions whose employer, The Mountain States Telephone and Telegraph Company, Respondent, is engaged in interstate commerce. A labor dispute arose between the Telephone Company and Petitioners; it resulted in a strike by Petitioners.

The Telephone Company filed petition for injunction in the State Court alleging interference with interstate commerce and a conspiracy to interfere with interstate commerce by its employees and their representatives, the Petitioners herein. Congress, having placed jurisdiction in the Federal District Courts of cases involving interference with and a conspiracy to interfere with interstate commerce, and having regulated the rights of employers, labor unions and employees engaged in interstate commerce, Petitioners seek to require the State Courts of the State of Texas to recognize these rights and the jurisdiction of the Federal District Courts after the filing

of proper and seasonable petition and bond for removal 15 USCA 1, 15 and 26, (28 USCA Sec. 41 and Sec. 71, **Loewe** vs. **Lawler** 208 US 274, 52 L Ed. 488; **Bedford Cut Stone Co.** vs. **Journeymen Stone Cutters Association,** 274 US 37, 71 L Ed. 916;**General Investment Co.** vs. **Lake Shore R. Co.,** 260 US 216; 67 L Ed. 244.

Petitioners, being labor unions and members of labor unions representing employees engaged in interstate commerce, have certain rights and privileges arising out of laws of the United States of which the District Courts of the United States have original jurisdiction; among the laws from which these flow are: the Norris-La Guardia Act, 29 USCA Sections 101-115, the Wagner-Connery Labor Relations Act 29 USCA Sections 151-162. The suit filed by the Respondent in the State District Court necessarily involved said acts and the proper determination of said suit depended upon the proper construction of those statutes.

Wherefore, Petitioners pray that the Writ of Certiorari issue to the Eighth Court of Civil Appeals of the State of Texas and that this Honorable Court do enter such orders as may be necessary to require the recognition of juisdiction of United States Distict Court, Western District of Texas, El Paso Division, over this cause and to transfer this cause to said Court for final disposition.

Dated at El Paso, Texas, this 26th day of January, A. D. 1948.

Respectfully submitted,

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O JAFFE,

orney for Petitioners.

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ERNEST GUINN

Of Counsel.

PETITIONER'S SUPPORTING BRIEF

A. DID THE TELEPHONE COMPANY'S PETITION FOR INJUNCTION STATE A CAUSE OF ACTION OF WHICH THE FEDERAL DISTRICT COURTS HAVE ORIGINAL JURISDICTION?

In answering this question, we adopt the language of an eminent former Federal Judge in construing the decisions of this Court applicable thereto:

> "It cannot be doubted that the cause of action thus stated is one to enjoin a conspiracy in restraint of interstate commerce and is one of which the United States Courts would have original jurisdiction. As framed it is of the same character as were the grievances of the plaintiffs in **Loewe** v. **Lawler, 208 US 274, 28 S Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n,** 274 US 37, 47 S. Ct. 522, 71 L. Ed. 916, 54 A. L. R. 791, and **Duplex Printing Press Company v. Deering,** 254 US 443, 41 S. Ct. 172, 65 L. Ed. 349, 16 ALR 196. In those cases it was held that where an unlawful conspiracy by members of a labor union was aimed directly at the Plaintiff's interstate trade, as by secondary boycotts, the case was under the ban of the federal anti-trust laws. It does not matter that by the same alleged conspiracy restraint is placed on intrastate commerce as well. **Loewe v. Lawler, supra.** It does not matter that the Sherman Anti-Trust Act and Clayton Act are not mentioned by name in the complaint. **Attorney General v. Michigan Bell Telephone Co.,** 235 Mich. 416, 209 N. W. 200. Nor does it matter that the Company could doubtless have based a case for injunction on cause of action with no federal aspects, a cause of action merely to restrain the

commission of tortious acts. In the complaint as drafted, it has seen fit to complain that its business in interstate commerce has been obstructed by unlawful conspiracy of Kolkin and others. A case of that character is a removable case." [1]

In the **Kolkin Case,** [1] Judge Patterson summarizes the facts and the issues as follows:

"The complaint alleged that the Gotham Company was in the business of purchasing and selling knitted goods, with its place of business in New York City; that it was engaged in interstate commerce, in purchasing goods from various manufacturers and in selling the same; that among its sources of supply was the Fedora Knit Corporation, with which the labor union had a trade dispute; that merely because the Gotham company purchased goods from the Fedora Corporation, the members of the union conspired to destroy the Gotham business and to prevent it from engaging in interstate commerce, in the course of which conspiracy they falsely declared that a strike was called against the Gotham company, picketed the place of business, intimidated the employees, and did other unlawful acts; that as result the Gotham company was prevented from carrying on its business in ordinary course of interstate commerce, to its irreparable injury. The relief demanded was an injunction against continuance of the conspiracy to destroy the interstate commerce of the Gotham company, picketed the place of business, intimidation, boycott, and son, together with damages. . . .

"Kolkin and his associates seasonably presented a petition and bond for removal of the action to the United States District Court. The ground of removal

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1—Judge Robert Patterson
Kolkin v. Gotham Sportswear, Inc. 10 Federal Supplement 682

was that the case arose under the laws of the United States being based on an alleged conspiracy in restraint of interstate commerce, and involved more than $3,000.00. . . .

"If the case brought by the Gotham company is a removable one in its nature, then the case was in law removed on the filing of petition and bond in due time, the case is in this court and the state court lost jurisdiction to proceed further in that suit. . . .

"The sole question is whether the suit brought in state court was one which on the record could be removed to this court by Kolkin and the other defendants in that suit. . . .

"The District Court, by section 24 (1) of the Judicial Code (28USCA No. 41 (1), is given jurisdiction over suits arising under the laws of the United States, provided the controversy involves more than $3,000.00. By the Removal Act (Judicial Code 28, 28 USCA 71), any suit arising under the laws of the United States, of which the District Court is given original jurisdiction, may be removed from a state court to the District Court. Kolkin's position is that the suit commenced against him by the Gotham company arises under the laws of the United States, to wit, under the federal anti-trust laws, and consequently is removable. I am of the opinion that the position is a sound one. . . .

The Sherman Anti-Trust Act, in section 1, declares conspiracies in restraint of inter-state trade or commerce to be unlawful. 15 USCA 1. By section 7, any person injured is given the right to sue for damages in District Court. 15 USCA 15 note. By section 16 of the Clayton Act, any person may have injunctive relief, by suit in the United States courts, against threatened

damage by violation of the anti-trust laws. 15 USCA 26. . . .

"The complaint in the State court, as already pointed out is grounded on the allegations that the Gotham company is doing business in interstate commerce, that Kolkin and others, because of a dispute between their union and a concern from which the Gotham company bought goods, conspired to break up such interstate commerce; and that in the course of such conspiracy Kolkin and his associates caused various torts to be committed against the Gotham company.

The fact that Appellee's pleading did not contain any reference to the Federal Statutes under which the controversy arose is immaterial. Whether the controversy arises under the Federal Statutes depends upon the facts alleged in the petition as distinguished from legal conclusions. This is fundamental. As held in Blease vs. Safety Transit Co. 50 Fed. (2) 852.

"Without invoking the rule that pleadings are to be construed most strongly against the pleader, it is clear from the face of the bill that complainants are seeking to restrain commerce which is interstate in character as well as that which is intrastate. . . .

"There is no question but that Defendant is, as a matter of fact, operating in interstate commerce and, for the reasons stated, we think that this fairly appears from the face of the bill."

We submit that Judge Patterson correctly construed the decisions of this Court on the facts and the issues before him, and that under the same construction, the Telephone Company's petition for injunction states a cause of action of which the Federal District Courts have original jurisdiction.

B. DID THE DISMISSAL OF THE SUIT BY THE STATE COURT AFTER PETITIONER FILED SEASONABLE AND PROPER PETITION AND BOND FOR REMOVAL TO THE FEDERAL DISTRICT COURT DEPRIVE THE FEDERAL DISTRICT COURT OF JURISDICTION.

The cause being a removable one the trial court had no further power or jurisdiction in the case other than to enter an order granting petition for removal and tansferring the case. In **Madisonville Traction Co. v. St. Bernard Mining Co.** 49 L. Ed. 462, 464, Justice Harlan said:

> "If a case be a removable one, that is, if the suit in its nature, be one of which the circuit court could rightfully take jurisdiction, then, upon the filing of a petition for removal, in due time, with a sufficient bond, the case is, in law, removed and the state court in which it is pending will lose jurisdiction to proceed further, and all subsequent proceedings in that court will be void." (Citing **New Orleans, et al v. Miss.**, 26 L. Ed. 96, 98 and many other Supreme Court Decisions.)

The above result cannot be circumvented nor defeated by a subsequent order in the state court which purports on motion of Respondents to dismiss the case on the ground that the controversy is moot or upon the theory that Respondent desired a non-suit.

The identical question was dealt with in **Henjes vs. Aetna Ins. Co.** 39 F. Supp. 19. In that case the Court said,

> "Upon the presentation of the petition for removal and bond to the State Court the latter court lost jurisdiction and the action is removed to the federal court. The removal of the action is effected immediately upon the presentation of the petition and approved bond regardless of whether the State court enters an order

or approves the bond. (Citing **New Orleans, etc. v. Mississippi** 26 L. Ed. 96, 98 and many other decisions.)

"The order of the Supreme Court made on the 14th of April, 1941, which purported to allow a discontinuance of the action can have no effect on this court. The case was properly removed to this court and is now here."

The position of the Respondent, The Telephone Company, has been that since the case was dismissed by them and since the strike of its employees, which prompted the filing of the injunction suit, is over, the question presented is moot and of no further importance.

If this contention be sound and the attitude of the State Courts be permitted to continue the practical result is that in all labor controversies involving an injunction and interstate commerce the jurisdiction of the Federal Courts and the provisions of the Federal Laws can be completely circumvented. State Courts which are not in sympathy with Federal Legislation may retain the cause, even though they have no jurisdiction, until the strike is over and before such action can be reviewed by the Supreme Court of the United States all of the assistance desired by the employer through the use of an injunction will have been afforded him by the State Courts.

In this case the Telephone Company obtained a temporary restraining order against its striking employees without any notice or hearing and after the employees had seasonably filed their petition and bond for removal, the State Court postponed the hearing on the petition and bond for removal and continued the temporary restraining order in effect until a convenient time for the Telephone Company and thereafter the Court refused to permit the removal of the suit and granted a temporary injunction without hearing any evidence. Such arbitrary action and total disregard of the jurisdiction of

the Federal District Court and the rights of Petitioners under the long established doctrine of this Court that once the petition and bond are properly and seasonably filed in a removable cause the jurisdiction of the State Court ceases and all subsequent action in such forum is utterly void.

The Eighth Court of Civil Appeals erred in refusing to correct the error of the trial court and should have entered its order ganting the petition for removal and such other orders that might be necessary to effect recognition of the fact that this cause is pending in the United States District Court of the Western Division of Texas, El Paso Division.

Respectfully submitted.

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